No. (1)

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1995

DAVID HARGETT,

Petitioner,

- against -

NATIONAL WESTMINSTER BANK, USA,
Gordon Oliosi and Roger Goldman,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In an employment discrimination action brought pursuant to 42 U.S.C. § 1981, is proof that other employees who committed the same offense for which the petitioner was terminated, were not terminated, sufficient to prove that respondents' stated reason for terminating petitioner was pretextual, without regard to the employment positions held by the various employees?

II. Whether the lower courts abused their discretion in ruling that no *Price Waterhouse* "mixed motives" charge was required, in light of the fact that petitioner showed that a mixed motives charge was proper, in accord with this Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), by submitting evidence to show that his termination was "the product of a mixture of legitimate and illegitimate motives" ? *Price Waterhouse*, 490 U.S. at 247.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. The parent company of respondent National Westminster Bank USA is, upon information and belief, National Westminster Bank, p.l.c., an English corporation; upon information and belief, all subsidiaries of respondent National Westminster Bank USA are wholly owned.

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No.

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DAVID HARGETT,

Petitioner,

vs.

NATIONAL WESTMINSTER BANK, USA,
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David T. Hargett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 78 F.3d 836 and is

reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 16a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 19, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This action was brought pursuant to 42 U.S.C. § 1981, which is set forth below:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This action was also brought pursuant to New York's Executive Law § 296(1)(a), which is set forth below:

> It shall be unlawful discriminatory practice for an employer or licensing agency, because of the age, race, creed,

color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

Petitioner David T. Hargett was a 10-year career employee of Citicorp, N.A. (a federally chartered bank) who had a stellar reputation, work history, and promotion record, when respondents began to recruit him for a position around September, 1991. During the course of the recruitment, Mr. Hargett, who is African-American and thus a member of a protected minority class, interviewed with respondent Goldman directly (R. 90). During the course of the interview, Mr. Hargett expressed his concern over the lack of minorities employed by respondent NatWest (R. 92). In response, Goldman stated that "this company is very vanilla" and that "you may experience some unfair treatment based on your race." (R. 92). Goldman promised Mr. Hargett that he would be able to do his job and that there would be no adverse impact "in case of any unfair treatment based on race." (R. 92). Mr. Hargett was "delighted" with respondent Goldman's promise (R. 93), and the recruitment was ultimately successful. (R. 97). Mr. Hargett was hired by respondents on or about November 13, 1991, in the position of Vice-President, Area Business Director, at an annual salary of

$95,000. (R. 97). Mr. Hargett reported to respondent Oliosi, and performed at a uniformly high and exemplary level throughout his employment. (R. 759-60, 789).

In late January, 1992, a group of employees approached Mr. Hargett and sought permission to have a celebration for a co-worker, Paul McConnie, and to bring in a stripper for the event. (R. 116-17). Mr. Hargett told the employees that "we couldn't have a stripper in the branch. That was inappropriate" (R. 119), and that "there could be no nudity." (R. 119). Mr. Hargett followed up on this request on January 30, 1992, by writing a request to respondent Oliosi "to have a woman coming in wearing a bathing suit to serve cake at our next meeting." (R. 119). Respondent Oliosi approved the request made by Mr. Hargett (R. 119), and the fact of Oliosi's approval of the note and knowledge that a woman in a bathing suit would perform was acknowledged by Ms. Barbara Hahn, a senior vice-president for human resources at appellee Bank. (R. 563-68).

Before the event, which was held on February 11, 1992, occurred, Mr. Hargett instructed Mr. George Stylianou, the employee who had requested to have a dancer present, to contact every person who was to be at the meeting and inform them that a dancer would be present, and that if anyone objected, "we could not have this dancer come in at our next meeting." (R. 120). Mr. Stylianou later informed Mr. Hargett that he had contacted every person and no one had objected to the dancer. (R. 122). At a break in the

meeting on February 11, 1992, where people were free to leave (R. 615, 704-05), the dancer came in after business hours (R. 121-22, 224), stripped down to "an aerobic gym type uniform" (R. 124), and sang happy birthday to Mr. McConnie. (R. 124). There was "no nudity, no G-string" (R. 124), and the entire event lasted about ten minutes. (R. 124).

On or about April 1, 1992, some 51 days after the meeting of February 11, 1992, Mr. Hargett was informed by respondent Oliosi that "senior management had gotten wind" of the event (R. 145-6). Oliosi told Mr. Hargett to "keep a low profile" and that he did not need to be concerned. (R. 146-7). On the following day, April 2, 1996, Mr. Hargett participated in an executive visit of the Chairman of the Board of respondent NatWest's parent company, National Westminster, p.l.c. (R. 147). This visit took place at a branch under Mr. Hargett's responsibility, and he was complimented by Oliosi on the success of the visit. (R. 147).

On April 6, 1992, Mr. Hargett was contacted by respondent Oliosi and told to come to his office, where Oliosi and Hahn were waiting for him when he arrived. (R. 154). Oliosi stated that an anonymous letter had been received and asked Mr. Hargett "to resign from the bank because I hired a stripper." (R. 154). Ms. Hahn allegedly received an anonymous document on April 2, 1992, complaining of Mr. Hargett allowing a "prostitute to strip to the bare bone because it was Paul McConnie's birthday." (R. 461-62). Ms. Hahn never sought to determine the origins

of the note; however, Mr. Hargett informed her that the dancer had stripped down to a bathing suit at the event. (R. 465, 470). Mr. Hargett protested that resignation would be improper, that Oliosi himself had approved the event, and demanded to speak with respondent Goldman. (R. 156-58). Oliosi refused to allow Mr. Hargett to speak to Goldman, claiming that he "had no right" to do so, and instructed Mr. Hargett "to leave the premises immediately." (R. 158). Mr. Hargett then went back to his office, where he found that all of his "personal effects were gone" - his desk, his credenza, his family portraits, confidential information, performance appraisals, his Rolodex - "everything had been totally removed from the premise." (R. 158-59). Mr. Hargett has never been able to retrieve any of these property items. (R. 165).

Several days later, Mr. Hargett met with respondent Goldman at a cafeteria at the Hyatt Hotel on 42nd Street in Manhattan. (R. 178-79). Mr. Hargett told Goldman that he had been unfairly treated and told him of similar incidents where dancers had come in and stripped on bank premises, and where the employees involved were not terminated. (R. 179). Goldman did not respond except to scribble on a napkin (R. 179), and no action was taken to reinstate Mr. Hargett, even with respondents having knowledge of these similar incidents. Thus, Mr. Hargett was terminated, wrongly, by respondents, on April 6, 1992.

At trial, there was no question that Mr. Hargett, as an African-American, is a member of a protected class, and that he

was qualified for his position and performed it in an exemplary and outstanding fashion. (R. 759-60, 789). There was also no question that, after Mr. Hargett's wrongful termination, he was replaced by two white individuals who assumed his duties. (R. 791).

Respondents offered three different reasons for Mr. Hargett's termination. Ms. Barbara Hahn, a senior vice-president for human resources at appellee Bank, testified that she received an anonymous document on April 2, 1992, complaining of Mr. Hargett allowing a "prostitute to strip to the bare bone because it was Paul McConnie's birthday." (R. 461-62). Ms. Hahn never sought to determine the origins of the note; however, she and Mr. Oliosi questioned Mr. Hargett, who told her that the female had stripped down to a bathing suit at Paul McConnie party and anniversary. (R. 465, 470). Ms. Hahn testified that she "made the recommendation" to terminate Mr. Hargett and that "[t]he decision to terminate him had to do with the striptease artist attending a bank meeting and he allowed that to happen." (R. 476-77). Respondent Oliosi testified that Mr. Hargett was terminated because of "the fact that he would allow a dancer, a stripper or whatever to do that at a meeting in a branch." (R. 864). Finally, respondent Goldman testified that Mr. Hargett was terminated because "after satisfying myself that David sat there while a woman took off some of her clothes, I couldn't look any woman who worked for the bank in the eye if I let David stay employed." (R. 906). Thus, three reasons were given for Mr. Hargett's termination: (i) he

allowed a "striptease artist" to perform at a bank meeting (Hahn); (ii) he allowed a stripper to perform at a meeting in a branch (respondent Oliosi); and (iii) he sat there while a woman removed some of her clothes (respondent Goldman).

These reasons were rebutted by evidence of two similar incidents, in which dancers stripped on bank premises, and in which, contrary to the termination of Mr. Hargett, the only punishment ever meted out was a verbal warning. These reasons were also rebutted by the fact that Ms. Hahn knew that respondent Oliosi had approved of the event held on February 11, 1992, (R. 119, 563-68), but she failed to terminate Oliosi for allowing a "striptease artist" to perform at a bank meeting.

Mr. Robert Bischer, a white employee who, at the time of trial, was employed by respondent Bank as "an assistant vice president in the business and professional credit service area" (R. 310) (a position comparable in hierarchy to Mr. Hargett's), testified as to a celebration for him as a branch manager in late March, 1990, at respondent Bank's branch located at 111 Broadway, New York, New York. Mr. Bischer testified that "a stripper, exotic dancer came into the office at approximately 4:30" and that she stripped down to "her bra and panties" while on the premises. (R. 312-314). With several employees present, including "nine or ten women", the stripper engaged in a "belly dance" to music played by a boom box she had brought with her. (R. 312-314). Mr. Bischer acknowledged that no one, including himself, was ever disciplined in any way

for allowing this stripper to come onto bank premises during bank hours and strip to her bra and panties in front of several bank employees, including nine or ten women. (R. 312-314).

Ms. Anne St. Paul, who is white, was, at least up to the time of trial, an assistant vice president and branch manager with respondent Bank. Ms. St. Paul testified that in September, 1991, a time when her direct supervisor was respondent Oliosi, she allowed a male stripper to come into the branch to celebrate an employee's 30th birthday (R. 358-359). In fact, Ms. St. Paul testified that she organized the event, paid for it, and allowed non-bank employees to be present at the event (R. 355-370). Ms. St. Paul testified that the male stripper came into the bank, played music, took his clothes off, and stripped down to his bathing suit, performing a "striptease" as characterized by Ms. St. Paul. (R. 366-368). The bathing suit "started at his waist and ended at the top of his legs." (R. 366-68, 377). Ms. St. Paul testified that she was given a verbal warning only as to this event; she was not put on probation or suspended, was not demoted, she never lost pay, and, in contrast to Mr. Hargett, she certainly was never terminated. (R. 373, 378-79). Thus, Ms. St. Paul, who allowed a stripper on bank premises during bank hours (and who reported to respondent Oliosi just as Mr. Hargett did), received nothing more than a verbal warning.

At the trial of this matter in the United States District Court for the Southern District, Judge Dominick DiCarlo,

a Court of International Trade judge who presided at trial, allowed the jury to consider, over petitioner's objections, the positions that each of these individuals held with respondent bank in determining whether such individuals were similarly situated to Mr. Hargett for the purposes of determining whether respondents' stated reasons for terminating Mr. Hargett were pretextual. (R. 978, 1118-19). Judge DiCarlo also refused to allow petitioner a *Price Waterhouse* mixed-motives charge. (R. 970-71).

On February 8, 1995, the jury returned a verdict of no liability, after finding, under the disparate treatment analysis, that petitioner had made out a prima facie case of employment discrimination, that respondents had offered a non-discriminatory reason for petitioner's termination, but that petitioner had not proved, by a preponderance of the evidence, that respondents' stated reason was pretextual. This judgment was effectuated by the Court in a judgment, dated February 10, 1995, ordering that, pursuant to the jury verdict, the complaint be dismissed. This judgment was entered by the clerk of the Court on February 14, 1995.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the trial verdict, finding that Judge DiCarlo did not abuse his discretion in (i) allowing consideration of employee position in determining whether Mr. Hargett was "similarly situated" to other employees, and (ii) denying petitioner's request for a *Price Waterhouse* mixed motives charge.

POINT I

THE COURT SHOULD GRANT THE WRIT, DUE TO A SPLIT IN THE FEDERAL CIRCUIT COURTS OVER THE MEANING OF "SIMILARLY SITUATED" IN EMPLOYMENT DISCRIMINATION CASES

This Court should grant the writ in order to resolve a split between the Federal Circuit Courts of Appeals on the important issue of determining when employees are "similarly situated" in proving that an employer's proffered reason for terminating (or otherwise taking action against) an employee is pretextual.

As the Second Circuit noted in its opinion, this Court has held, in an employment discrimination case, that

> [a plaintiff] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection [or termination]. Third, should the defendant carry this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

78 F.3d at 838 (App. A, 3a-4a), quoting

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). As the Court of Appeals noted, "[Mr.] Hargett made out a prima facie case of employment discrimination." 78 F.3d at 838 (App. A, 5a). The Court of Appeals also noted, correctly, that respondents gave a nondiscriminatory reason for Mr. Hargett's termination - "namely that he had allowed a female stripper to perform at a function during business hours on National Westminster premises and that he had attended the function." 78 F.3d at 838 (App. A, 5a). Thus, the burden of proof shifted back to Mr. Hargett to prove that respondents' stated reason was pretextual.

This Court first addressed the issue of pretext in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), where this Court ruled that

> [e]specially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired . . . [o]ther evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.

McDonnell Douglas, 411 U.S. at 804-05. This Court further expounded on the issue of pretext in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), where this Court ruled that

> as was indicated in *McDonnell Douglas*, an allegation that other "employees involved in acts against (the employer) of comparable seriousness . . . were nonetheless retained . . . " is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

McDonald, 427 U.S. at 283 n. 11, quoting *McDonnell Douglas*, 411 U.S. at 804. Thus, this Court has clearly stated that proof that employees, who have committed the same offense for which a claimant was allegedly terminated (i.e., "similarly situated" employees), were not terminated but treated differently, is sufficient to prove that the employer's proffered reason for the termination of the claimant is pretextual.

Some, but not all, of the Federal Circuit Courts of Appeals, have followed this Court's rulings. Thus, the Eighth Circuit Court of Appeals held, in *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994), that

> [e]mployees are similarly situated when they "are involved in or accused of the same

> offense and are disciplined in different ways."

Harvey, 38 F.3d at 971, quoting *Boner v. Board of Commissioners of the Little Rock Municipal Water Works*, 674 F.2d 693, 697 (8th Cir. 1982). The *Boner* Court ruled that

> [w]hat is relevant (in determining whether employees are similarly situated) is that two employees are involved in or accused of the same offense and are disciplined in different ways.

Boner, 674 F.2d at 697, quoting *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981).

Other Circuit Courts have not applied this Court's rulings on this issue uniformly. In *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1994), the plaintiff, a supervisor who was demoted for violating the employer's sexual harassment policy, was able to point to another (non-supervisory) employee who had committed the same offense and was not demoted. The Sixth Circuit held that employment position was relevant based on the employer's potential liability under Title VII for the illegal acts of a supervisor (strict liability) and a non-supervisor (employer liable only if it knew or should have known of such acts):

> [t]hus, unlike the case of supervisor Pierce, the company would have the opportunity to

> assess and remedy any sexual harassment complaints lodged against non-supervisor Kennedy before incurring liability.

Pierce, 40 F.2d at 804. Thus, the Sixth Circuit based its ruling not solely on the "acts . . . of comparable seriousness", *McDonald*, 427 U.S. at 283 n. 11, quoting *McDonnell Douglas*, 411 U.S. at 804, but also on an unprecedented consideration of the standard of proof required with respect to liability. Thus, *Pierce* represents an erroneous "similarly situated" analysis based on impermissible considerations.

The Second Circuit's decision in this case and previous cases underscores the danger of erroneous analysis, and show how the excuse of "job position" becomes, of itself, a pretext used to justify unlawful discriminatory acts. In this case, the Second Circuit agreed with respondents' argument that job position was relevant to the "similarly situated" analysis, finding that "[r]equiring higher-ups to conform to a higher standard of decency is not contrary to established law and does conform with common sense." 78 F.3d at 840. Respondents, and, as a result, the Second Circuit, relied heavily on the ruling in *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 96-97 (2d Cir. 1994).

In *Henry*, the plaintiff was terminated, according to the employer, for accepting overpayments "for her husband's medical expenses." *Henry*, 42 F.3d at 92. With respect to this proffered reason for termination, the plaintiff alleged that

> ten named persons, all white, male, or both, charged by the defendant with misconduct, were allowed to remain on the payroll or resign pending the disposition of charges against them.

Henry, 42 F.3d at 94. The Second Circuit found that, "as the district court noted, Henry failed to corroborate this allegation in any way", *id.*, and simply approved of

> the district court's finding that eight of the ten enumerated employees were not, in fact, "similarly situated" to Henry -- because they either held a different occupational status, or engaged in conduct different in kind to that attributed to Henry.

Id. Thus, the Second Circuit relied on the district court's ruling, which, as will now be shown, was erroneous and based on a misinterpretation of case law.

The district court in *Henry*, see Memorandum and Order dated January 7, 1994, at 15 (App. C at 17a) adopted the holding of *Mazzella v. RCA Global Communications, Inc.*, 642 F.Supp. 1531 (S.D.N.Y. 1986), *aff'd without opinion*, 814 F.2d 653 (2nd Cir. 1987), that

> [e]mployees are not "similarly situated" merely because their conduct might be analogized.

> Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.

Mazzella, 642 F.Supp. at 1546-47[1], citing *Talley v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 446 U.S. 952 (1984).

This holding in *Mazzella* was clearly fabricated out of thin air, as the Court in *Talley* said none of those things attributed to it by the *Mazzella* court, but simply noted that the district court had

> correctly found . . . that Talley and the other employees were not similarly situated. *See Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1255 (8th Cir. 1981).

Talley, 720 F.2d at 507. Thus, the Second

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[1]In *Mazzella*, the plaintiff claimed wrongful discharge because she was pregnant; the Court noted that she failed to prove that the employer's stated reason for termination, poor performance, was pretextual. *Mazzella*, 642 F.Supp. at 1547. The Court noted that other employees were not similarly situated because they *had not committed the same offense* of poor performance; see *Mazzella*, 642 F.Supp. at 1546.

Circuit, in this case, has relied on cases, which in turn rely on cases, which do not stand for the propositions for which they are cited.

The *Talley* case, in fact, points out the danger and the absurdity of allowing employment position to be a relevant consideration in determining whether two employees are "similarly situated" in analyzing pretext. *Talley* involved a situation where the termination of "temporary casual employees" after the first time they lost their keys was found to be justified, in contrast to the fact that "career" employees were not terminated the first time they lost their keys, because

> [c]areer employees, through a corrective and progressive form of discipline, are given an opportunity to improve their performance. Casual employees, because of the short-term nature of the position, are discharged following the commission of a serious offense.

Talley, 720 F.2d at 507. That is, the employee with less responsibility and status was made *more* accountable. This holding by the *Talley* court flies in the face of the Second Circuit's holding in this case that "[r]equiring higher-ups to conform to a higher standard of decency is not contrary to established law . . . " 78 F.3d at 840 (App. A at 9a). It also shows that employment position can be used, and has been used in this case, as an excuse for unlawful discriminatory acts. For this Court to allow such

misinterpretations of its holdings, would be to allow employers to commit unlawful discriminatory acts against employees, and to be able to justify such acts by asserting that such employees were held to a higher standard of accountability than other employees because of their employment position (regardless of whether such position is a "higher up" position or a "lower down" one).[2] Indeed, an application of the *Talley* court's "similarly situated" analysis, in the instant case, would mean that petitioner, as an individual actively recruited by respondents and thus more of a "career employee" who is to be "given an opportunity to improve [his] performance, *Talley*, 720 F.2d at 507, would have retained his job, whereas Bischer and St. Paul, at the time of the offense lower-level employees, would have been terminated.

Finally, an analysis of the case cited by the *Talley* court, *Johnson*, in support of its inclusion of employment position as a consideration in the "similarly situated" analysis, shows that such inclusion was fabricated out of thin air. In *Johnson*, in response to the employer's stated reason that he was discharged for insubordination, the plaintiff "presented testimony of a white

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[2] Ironically, the *Talley* court, as did the *Mazzella* court, found that plaintiff had not been terminated until she had lost her keys a second time, and that the other employees were not similarly situated because they *had not committed the same offense* - they had not lost their keys more than once. *See Talley*, 720 F.2d at 507.

employee who, despite having sworn at . . . an assistant supervisor . . . was not discharged." *Johnson*, 646 F.2d at 1255. In reflecting on the standard to be applied in the "similarly situated" analysis, the *Johnson* court correctly followed this Court's holdings in *McDonnell Douglas* and *McDonald*:

> [f]or Johnson to prove a pretext *he must show a similarity between his conduct and that of white employees not discharged.* (citation omitted). He has failed to do so. Rusty Schaffer, the plant supervisor, heard Johnson swearing at an assistant supervisor. In the example relied on by Johnson, Rusty Schaffer did not hear the white employee swear at an assistant supervisor. The testimony showed this to be the case. Schaffer testified that the only employee, other than Johnson, he had ever heard swear at a supervisor was white. Schaffer discharged that employee. Johnson was discharged because Rusty Schaffer heard him swear at a supervisor, and not because he was black. The evidence showed that *blacks and whites engaged in similar conduct were treated identically.* (emphasis added).

Johnson, 646 F.2d at 1255-56. Thus, the *Talley* court misread *Johnson* and added an improper consideration, namely employment position, to the "similarly situated" analysis. This improper consideration was

relied upon by the *Mazzella* court, and *Mazzella* was in turn relied upon by the *Henry* court. Such an improper consideration directly contradicts the Supreme Court's holdings in *McDonnell Douglas* and *McDonald*, and requires that the petition for writ be granted.

POINT II

THE COURT SHOULD GRANT THE WRIT, AS THE CIRCUIT COURT'S RULING ON "MIXED MOTIVES" CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Court of Appeals upheld the lower court's ruling denying petitioner a *Price Waterhouse* "mixed motives" instruction to the jury. *See* 78 F.3d at 840-41.

This Court has held that a mixed motives charge is proper when there is evidence to show that an employment determination was "the product of a mixture of legitimate and illegitimate motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989). According to the Second Circuit, to show that a mixed motives charge would be proper, it is sufficient to show that a decisionmaker made statements "that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992); *see also Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993), *accord, Kirschner v. Office of the*

Comptroller of the City of New York, 973 F.2d 88, 93 (2d Cir. 1992).

There is no question that Mr. Hargett met his burden of showing evidence "reflecting the alleged discriminatory attitude . . . ", *Ostrowski*, 968 F.2d at 182; see also *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2nd Cir. 1992). With respect to such proof, the Second Circuit has held that

> a plaintiff may prove that the forbidden animus "was a motivating factor" through the presentation of either "direct or circumstantial evidence."

Ostrowski, 968 F.2d at 181-82, quoting *Tyler*, 958 F.2d at 1185-86. If circumstantial proof is offered as proof of the forbidden animus, "that circumstantial evidence must be tied directly to the alleged discriminatory animus." *Ostrowski*, 968 F.2d at 182. Thus, in *Tyler*, which involved an age discrimination claim, the Second Circuit approved a mixed-motives charge based on the fact that

> the plaintiff had presented evidence not only that younger employees had received favorable treatment while he had not, but also that the company had an approved category of employees it called the "Young Tiger classification", and that company appraisals specifically referred to "youth in a positive manner."

Ostrowski, 968 F.2d at 182, citing *Tyler*, 958 F.2d at 1179. In *Ostrowski*, another age discrimination case, this Court held that a mixed-motives charge would be appropriate

> if the plaintiff presents evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude, and that evidence is sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision.

Ostrowski, 968 F.2d at 182. Such evidence was presented in the instant case, by the fact that respondent Goldman told Mr. Hargett that respondent NatWest was very "vanilla" and that he "may experience some unfair treatment based on your race." (R. 92). Such evidence not only reflects the discriminatory attitude of respondents, but also exists as a "general policy and practice with respect to minority employment" to show that a motivating factor in Mr. Hargett's termination was race. *McDonnell Douglas*, 411 U.S. at 804-05; *see also Lieberman v. Gant*, 630 F.2d 60, 68 (2d Cir. 1980) (noting that, in addition to other factors, "[e]vidence of general patterns of discrimination by an employer is relevant even in an individual disparate treatment case").

Additional evidence was offered at trial which showed respondents'

discriminatory attitude and general patterns of discrimination. Ms. Hahn, who testified that the investigation, recommendation of termination of Mr. Hargett, and subsequent termination, began with her receipt of any anonymous letter levelling accusations at Mr. Hargett (R. 448); however, Ms. Hahn never traced the letter or sought to discover its origins (R. 486); she never conducted an investigation of respondents Goldman or Oliosi, both of whom also stood accused in the letter (R. 524); nor did she conduct an investigation of the individual who acknowledged that he had arranged for the dancer to appear at the February 11, 1992, event. (R. 523). Ms. Hahn also failed to properly investigate an employee about whom she received a letter which accused him of sexual harassment. (R. 504). Finally, respondent Goldman, who had promised Mr. Hargett that he would not allow any unfair discriminatory practice against him to occur (R. 92), broke that promise to Mr. Hargett, failed to intervene to prevent his wrongful termination, and, after finally meeting with him days later, failed to take any action to correct the wrongful acts, even though he knew of similar incidents in which other employees were not terminated. (R. 178-80).

Ms. Hahn's *glaring* failure to investigate Mr. Bischer and Ms. St. Paul, and others involved in those incidents, and her utter failure to investigate the employee accused, in a letter which she received, of sexual harassment, in the same manner that Mr. Hargett was investigated and then terminated, raises the specter of discrimination. Respondent

Goldman's admission that Mr. Hargett might receive discriminatory treatment (R. 92), and his failure to act to prevent such treatment, when he knew that other employees had committed the same offense of which Mr. Hargett was accused, and had not been terminated, indisputably shows illegitimate motives, as required by this Court in *Price Waterhouse*. These facts, submitted at trial, are more than sufficient to meet this Court's threshold requirement for showing that a mixed motives charge is proper, and for this reason the petition for a writ should be granted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 16, 1996
New York, New York

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 19, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued 11/21/95 Decided 3/19/96

No. 403, Docket 95-7266

DAVID T. HARGETT,
APPELLANT

v.

NATIONAL WESTMINSTER BANK, USA,
GORDON OLIOSI AND ROGER GOLDMAN,
APPELLEES

Appeal from the United States District Court for the Southern District of New York

(93 CIV 4450)

Dan Cherner argued the cause and filed the briefs for appellant.

Kenneth J. Kelly argued the cause and filed the brief for appellees.

Before CARDAMONE, WALKER, and PARKER, Circuit Judges.

WALKER, Circuit Judge:

Plaintiff David T. Hargett appeals from a judgment of the United States District Court for the Southern District of New York (Dominick L. DiCarlo, *Chief Judge of the International Court of Trade*,

sitting by designation), following a jury verdict for Defendants that resulted in dismissal of the complaint in which Hargett had alleged that he was discriminatorily terminated from his employment. On appeal, Hargett alleges that the district court erred by: (1) issuing an erroneous jury instruction on the issue of "pretext" by informing the jury that it could consider the employment positions held by others in determining whether those individuals were "similarly situated" to Hargett; (2) refusing to issue a "mixed motives" jury instruction; and (3) refusing to admit into evidence a document allegedly written by a witness who was unavailable at trial.

For the reasons that follow, we affirm.

BACKGROUND

On November 13, 1991, Hargett, an African-American male, was hired as "Vice President, Area Business Director," by National Westminster Bank USA ("National Westminster" or the "Bank") at an annual salary of $95,000. Hargett was hired away from a $70,000 per year position at Citibank, a competitor of National Westminster. Less than five months later, on April 6, 1992, National Westminster terminated Hargett's employment. The Bank's stated reason for Hargett's dismissal was that he had permitted a female stripper to perform at a monthly branch manager's meeting over which he presided, apparently in celebration of another employee's birthday and service anniversary. The meeting at which the stripper performed was held on February

11, 1992 during business hours in a conference room on National Westminster's premises.

There was evidence at trial that on at least two prior occasions, other National Westminster employees held functions where strippers performed. On one of these occasions, a male stripper appeared at a National Westminster branch after normal banking hours. The employee responsible for arranging the function, a birthday celebration for another employee, was given a verbal warning but was not terminated from her employment. On another occasion, a going-away party for an employee, a female stripper performed at a different National Westminster branch after normal banking hours. No one connected with that function was disciplined in any manner.

DISCUSSION

The essence of Hargett's complaint was that he was terminated as a result of racial discrimination, in violation of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (1991), and of N.Y. Exec. Law § 296(a)(1).

I. The Pretext Charge

It is well settled law that a plaintiff in an employment discrimination case

> has the burden[, first] of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if

> the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection [or termination]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (internal quotations and citations omitted). "In order to establish a prima facie case of racial discrimination in firing in violation . . . of Title VII, the plaintiff must show that she belongs to a protected class, that she was qualified for the position, that she was discharged, and that her discharge occurred 'in circumstances giving rise to an inference of racial discrimination.'" *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (quoting *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987)). Notwithstanding the three-part test for determining disparate treatment, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093.

In this case, Hargett made out a prima facie case of employment discrimination. Defendants then offered a non-discriminatory reason for terminating him - namely that he had allowed a female stripper to perform at a function during business hours on National Westminster premises and that he had attended the function. Hargett was therefore correctly afforded the opportunity to prove that the non-discriminatory reason was in fact pretextual.

A plaintiff in a discrimination action may establish that a reason articulated by a defendant for termination of plaintiff's employment is a pretext and that race, in fact, did play a part in the decision to terminate by proving that "similarly situated" white employees were treated more favorably than he. *See Henry v. Daytop Village, Inc.*, 42 F.3d 89, 96-97 (2d Cir. 1994). To that end, Hargett pointed to evidence that at least two other National Westminster employees hired strippers to perform at functions on bank premises, that both of these employees were white, and that neither of them was fired for his/her conduct. Despite the fact that both individuals held positions lower down in the National Westminster corporate hierarchy than he, Hargett argues that these individuals were "similarly situated" to him because they engaged in the same conduct. Hargett therefore argues that Judge DiCarlo erred in instructing the jury that it could consider employment position in determining whether certain National Westminster employees were "similarly situated" to Hargett. Judge DiCarlo instructed the jury as follows:

> It is for you to decide if the other individuals were similarly situated to the plaintiff. You may consider the positions held and the conduct in question in determining if the individuals were similarly situated. If you believe by a preponderance of the evidence that plaintiff has proven that other similarly situated employees did commit similar acts and were not terminated, then you may find defendants' reason pretextual.

In rejecting Hargett's proposed charge, which would have eliminated reference to the positions held by himself and the two other National Westminster miscreants, Judge DiCarlo stated that he believed the issue to be one of first impression, and concluded that employment position was a factor for the jury to consider along with the conduct in question in deciding whether the persons were "similarly situated."

Hargett contends that this case is not one of first impression and that the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), ruled out consideration of position within the company in deciding whether persons treated differently were "similarly situated." We disagree. The Supreme Court never addressed this question in *McDonnell*. The *McDonnell* Court stated only:

> [R]espondent must . . . be afforded a fair opportunity to

> show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired.

411 U.S. at 804, 93 S.Ct. at 1825. As defendants accurately note, this statement does not imply that the determination of whether acts are of "comparable seriousness" requires a myopic examination of the acts alone without regard to context or surrounding circumstances. Nothing in *McDonnell* precludes a finding that identical acts undertaken by persons of differing authority or in differing circumstances are in fact dissimilar. One can easily posit a situation where language that might be tolerated in a back office would be unacceptable at a reception desk. In a similar vein, a corporate officer who is expected to lead others might well be held to a higher standard of conduct than a lower-level functionary.

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Supreme Court stated that:

> precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in acts

> against [the employer] of *comparable seriousness* . . . were nevertheless retained . . . is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

Id. at 283 n. 11, 96 S.Ct. at 2580 n. 11 (internal quotation and citation omitted). Nothing in this language precludes a finding that similar acts committed by employees occupying different levels of authority are in fact not of "comparable seriousness."

Defendants argue that:

> Plaintiff's argument is that the standards of conduct as to all actions are identical for a bank's chairman, trust officers, personnel officers, drivers, cashiers and janitors, and thus, the jury cannot make any distinction as to the standards of appropriate conduct based on the individual's level in the corporate hierarchy. This contention, which defies common sense, is an erroneous statement of law.

We agree. Requiring higher-ups to conform to a higher standard of decency is not contrary to established law and does conform with common sense. It is significant to note, in this respect, that National Westminster warned its employees, via its employee handbook ("NatWest &

You"), that "[s]enior officers and certain employees . . . may be subject to more specific procedures or standards."

We also note that the instruction permitting the jury to consider employment position did not necessarily disfavor Hargett. In support of his claim of race-based discrimination, Hargett argued at trial that Defendant Oliosi, who is white and held a superior position to Hargett, was not terminated despite having approved the stripper for the February 11, 1992 meeting. Allowing the jury to consider Oliosi's employment position could therefore have benefitted Hargett in his claim of racial discrimination.

Finally, we observe that Judge DiCarlo did not hold that, as a matter of law, the individuals with whom Hargett compared himself were not "similarly situated" to him. The district court simply instructed the jury that it could consider the positions held by those individuals in making its determination on the "similarly situated" issue.

II. The "Mixed Motives" Charge Request

Hargett also argues that the district court erred in declining to give a "mixed motives" charge. We disagree.

In an employment discrimination case, a "mixed motives" charge is proper where there is evidence to show that an employment determination was "the product of a mixture of legitimate and illegitimate motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989). We

have previously stated:

> [I]f the plaintiff presents evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude, *and that evidence is sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision*, the jury should be instructed that if it does draw that inference the plaintiff is entitled to recover unless the employer has established by a preponderance of the evidence that the employer would have taken the same action without consideration of the impermissible factor.

Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (emphasis added).

Hargett alleges that a "mixed motives" charge was required based upon two items of evidence: (1) his own testimony with respect to his conversation with Defendant Goldman, the superior officer who had hired Hargett, and (2) the testimony of an assistant vice president and branch manager of National Westminster, an employee inferior to Hargett. It is plain to us that the testimony of the latter was insufficient to require a "mixed motives" instruction. With respect to Hargett's termination, one

of National Westminster's assistant vice presidents stated only that "I thought there was a lot more to it than just - I thought there was a lot more to it than what had happened." There is no evidence to indicate that this employee was making reference to Hargett's race. Moreover, the employee had no involvement in the decision to terminate Hargett and thus the basis of whatever she "thought" could only be speculation.

Hargett's testimony regarding his pre-employment conversation with Goldman presents a closer question. Hargett testified that Goldman told him that National Westminster was "very vanilla" and that Hargett "may experience some unfair treatment based on [his] race." Goldman denied making these statements. Furthermore, Hargett himself testified that Goldman stated that he would protect Hargett should Hargett be subjected to any unfair treatment based on his race. Based on this evidence, we cannot conclude that the district court abused its discretion in finding that a "mixed motives" instruction was not required.

III. The Handwritten Document

Hargett contends that the district court erred in ruling inadmissible a handwritten letter which allegedly was written by a vice president and branch manager at National Westminster who was unavailable as a witness at trial. The letter, which was unaddressed and unsigned, in relevant part stated as follows: (1) the author suggested to Hargett that there be a stripper at the February 11, 1992 function; (2) Hargett

responded that because there would be mixed company at the meeting, the female managers should be contacted for permission; (3) the author contacted these managers, as well as other female visitors, and obtained their permission to proceed with the stripper; (4) the stripper arrived at the meeting clothed in a French maid's outfit, performed for approximately ten minutes, and was left wearing only a bikini-type outfit; (5) during the course of the stripper's performance, all of the women in attendance left; (6) the stripper then left and the meeting continued until approximately 6:30 p.m., at which time everyone left; and (7) the author personally paid $80.00 for the stripper and although he expected to be reimbursed by the other managers, he subsequently forgot to collect from them.

Hargett argues that the letter should have been admitted as an exception to the hearsay rule, under Federal Rule of Evidence 803(6). That rule permits the admission of hearsay evidence that is in the form of

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or

> data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph included business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed.R.Evid. 803(6).

Alternatively, Hargett argues that the letter should have been admitted pursuant to Federal Rules of Evidence 804(a) and 804(b). Rule 804(a) sets forth the definition of "unavailability of a witness." It is uncontested that the alleged author of the document was unavailable. Rule 804(b) enumerates several categories of testimony that are not excluded by the hearsay rule if the declarant is unavailable as a witness. Rule 804(b)(3) describes one such exception, in relevant part, as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not

> have made the statement unless believing it to be true.

Rule 804(b)(5) describes another exception, in relevant part, as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The district court refused to admit the document into evidence under either Rule 803(6) or Rule 804(b). Judge DiCarlo stated that the document was inadmissible hearsay and that Hargett had failed to establish a foundation for its admission as a business record. The determination of whether a record is sufficiently reliable to warrant its admission is within the sound discretion of the district court, *United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995), and a district court's findings as to whether the prerequisites for admissibility have been met will not be overturned absent a finding that they are clearly erroneous, *Potamkin Cadillac Corp. v. B.R.I. Coverage*

Corp., 38 F.3d 627, 632 (2d Cir. 1994).

In this case, the district court did not abuse its discretion in refusing to admit the evidence under Rule 803(6). The district court's finding that Hargett failed to establish a foundation for the document is supported by the record and is not clearly erroneous. Oliosi, the only witness questioned about the document, testified that he did not recall the circumstances under which the document was created. Furthermore, the district court did not abuse its discretion in refusing to admit the evidence under Rule 804(b). There was no showing that the document was contrary to the author's pecuniary interest. If anything, the language of the document would seem to be self-serving. Finally, the interests of justice were not frustrated by the district court's refusal to admit the document which contained little information not already in the record.

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby affirmed.

APPENDIX B - JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED FEBRUARY 14, 1995

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 93-4450 (DLD)

DAVID T. HARGETT,

Plaintiff,

v.

NATIONAL WESTMINSTER BANK, USA, ROGER GOLDMAN AND GORDON OLIOSI,

Defendants.

JUDGMENT

A Jury Trial before the Honorable DOMINICK L. DiCARLO, United States District Judge, having begun on January 30, 1995, and at the conclusion of the trial the jury having answered the attached verdict form, and the jury in so doing having returned a verdict in favor of defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, NEW YORK
February 10, 1995

_____s/_____
Clerk

By:_____s/_____
Deputy Clerk

APPROVED:

_____
U.S.D.J.

APPENDIX C - EXCERPTS FROM MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 7, 1994

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 91-4488 (ILG)

CELIA HENRY,

Plaintiff,

v.

DAYTOP VILLAGE, INC.,

Defendant.

MEMORANDUM AND ORDER

This is a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 seeking an order dismissing plaintiff's complaint for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. For the following reasons, the motion is granted.

. . . . .

In *Mazzella v. RCA Global Communications, Inc.*, 642 F.Supp. 1531, 1546-47 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987), the court outlined the relevant legal principles to be applied when comparing employees in a Title VII context:

> [F]or evidence relating to other employees to be relevant, those employees must be situated similarly to plaintiff. Employees are not "similarly situated" merely because their conduct might be analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.

The inquiry, therefore, is twofold: (i) did the plaintiff possess the same occupational status as the other non-minority employees (*i.e.*, same supervisor, same standards governing performance evaluation and discipline); and (ii) did the non-minority employees engage in conduct similar to the plaintiff's "without such differentiating or mitigating circumstances that would distinguish their conduct."

. . . . .

CONCLUSION

For the foregoing reasons, defendant's motion is granted.

SO ORDERED.

Dated: Brooklyn, New York
January 7, 1994

s/
I. Leo Glasser, U.S.D.J.